(10)

No. 96-454

In The

Supreme Court of the United States

October Term, 1996

ASSOCIATES COMMERCIAL CORPORATION,

Petitioner,

v.

ELRAY RASH AND JEAN RASH,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether, when a debtor proposes to retain a secured creditor's collateral under the cramdown powers of Chapter 13 of the Bankruptcy Code, the amount required to be paid on account of the creditor's secured claim is limited to the value that the secured creditor could have obtained if it had sold the collateral at foreclosure.

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INTEREST OF AMICI CURIAE

NationsBank, N.A., NationsBank, N.A. (South), NationsBank of Texas, N.A., Bank of America Texas, N.A., Bank of America National Trust and Savings Association, BANC ONE CORPORATION and The Chase Manhattan Bank USA, N.A. (collectively the "Banks") hereby respectfully file their brief *amici curiae* in this case. The consent of the attorneys for the Petitioner and the Respondent has been obtained.

The United States Court of Appeals for the Fifth Circuit (the "Court of Appeals"), in an *en banc* opinion, held that the value of a secured claim is limited to the amount the secured creditor could realize from a hypothetical sale of its collateral even when a Chapter 13 debtor proposes to retain such collateral for personal use. *Associates Commercial Corp. v. Rash (In re Rash)*, 90 F.3d 1036 (5th Cir. 1996) (the "Decision"). The interest of the Banks in this case arises from the direct detrimental effect the Decision has on the value of secured loans held by the Banks. The Banks support the view expressed by the six dissenting Circuit Judges in *Rash* that 11 U.S.C. § 506(a) (1995) (all statutory references contained herein refer to the United States Bankruptcy Code, Title 11, United States Code) requires a bankruptcy court to value retained collateral in a Chapter 13 case based on its replacement rather than wholesale cost. If the decision below is upheld, the value of virtually all claims secured by personal property, including vehicles, in Chapter 13 cases will be based on wholesale values even when debtors choose to retain and use such collateral during and subsequent to their bankruptcy proceedings.

The extent of the detrimental effect of the Decision on the Banks is best illustrated by the number and value

of their claims in Chapter 13 bankruptcy cases. NationsBank, N.A., NationsBank N.A. (South) and NationsBank Texas, N.A. (collectively "NationsBank") were creditors in 7,788 pending Chapter 13 bankruptcy cases as of December 31, 1996.[1] Approximately 45% of these Chapter 13 cases involve personal property collateral that was retained for use by debtors. The retail or replacement value of the collateral being retained and used by the debtors in these cases averaged $11,800.00 per case. Thus, valued on a retail basis, the total approximate amount of these secured claims was $41,350,000.00. Considering an average difference of 20-25% between retail and wholesale values,[2] application of the valuation standard mandated by the Decision would have cost NationsBank alone between $8,500,000.00 and $10,000,000.00 had that standard been applied to all cases now pending.

[1] These statistics do not include the more than 6,000 consumer bankruptcies (Chapter 7 and Chapter 13) that were transferred to NationsBank upon its acquisition of Boatmen's Bancshares, Inc. and its subsidiaries.

[2] A review of recent editions of N.A.D.A. Official Used Car Guide, a recognized industry publication used for valuing automobiles, indicates that the wholesale or foreclosure value of a vehicle is approximately 20-25% lower than its retail, or replacement, value.

The Chase Manhattan Bank USA, N.A.'s indirect[3] automobile portfolio contains approximately $50 million in bankruptcy claims; of these, approximately 23% are asserted in Chapter 13 cases. The total amount of Chapter 13 autofinancing claims is approximately $20 million. In addition to these claims, Texas Commerce Bank (a Chase affiliate) had 889 new bankruptcy cases in 1996 involving loans secured by automobiles with total claim amounts of $11,848,860.00. Of the claims secured by automobiles, 383 were asserted in Chapter 13 cases. These Chapter 13 claims have a total balance of $5,428,816.00.[4]

Bank of America National Trust and Savings Association and its subsidiaries ("Bank of America") are currently in the same position as the Petitioner in at least 1,103 pending Chapter 13 cases. In each of these cases, Bank of America's claim is secured by an automobile that has been retained by the debtor, and the claim (both the secured and unsecured portions) is being paid through the Chapter 13 reorganization plan. Those claims have a total value of approximately $7.8 million. The total amount of claims held by Bank of America in newly filed

[3] The indirect automobile portfolio includes all retail installment sales contracts secured by automobiles which have been assigned to Chase Manhattan by automobile dealerships from across the country.

[4] Together the Chase Manhattan indirect portfolio and the Texas Commerce Bank portfolio account for most, but not all, of the claims held by Chase's affiliates. For example, Chase Financial Corporation holds claims secured by automobiles in 110 Chapter 13 cases. The total dollar amount of these claims is unavailable.

consumer cases, excluding credit card debt, in 1996 was at least $33.8 million.

The significance of the valuation standard applied in the Decision will increase as the number of consumer bankruptcy filings continues to rise. As tracked by the Administrative Office of the United States Courts, Chapter 13 filings across the country increased by 9% during the twelve-month period ending September 30, 1995, from the previous fiscal year. Administrative Office of The United States Courts, *1995 Annual Survey*, Table F-2. During the following twelve months, Chapter 13 filings increased another 23.9% to a record high of 336,615 filings. Administrative Office of The United States Courts, *1996 Annual Survey*, Table F-2. Despite a generally expanding economy and low unemployment, the number of consumer filings has more than tripled since 1980. *Written Statement of American Banker's Association et al. before the National Bankruptcy Review Commission*, December 17, 1996 (hereinafter *Statement to N.B.R.C.*). The Banks expect this trend to continue in 1997 and beyond; thus, the impact of this Court's decision on the value of secured claims will be even more significant as the number of personal bankruptcies rises.

Lenders determine the cost of credit based in part on their estimate of costs or losses that will be caused by future events. *See* Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625, 635, 637 n. 40 (1997). If the Decision is upheld, the Banks will face an increase in such costs created by the change in the standard for valuation of secured claims. The losses which will be incurred by the Banks and other consumer finance companies will also affect customers seeking secured

credit. Lenders will likely adjust the price of all consumer loans to account for the change in the potential losses caused by bankruptcy filings. *Id.* Although not currently quantifiable, bankruptcy losses of this magnitude will be passed on to consumers in the form of higher interest rates and decreased availability of credit. *Statement to N.B.R.C.* Thus, the outcome of this case has direct and substantial financial consequences for the Banks, other entities providing secured credit, and the customers they serve.

SUMMARY OF ARGUMENT

When construed as a whole, § 506(a) of the Bankruptcy Code requires courts to value retained collateral based on its replacement rather than wholesale value to determine the amount of an allowed secured claim during plan confirmation. Correctly construed, the first sentence of this subsection describes what courts should value in determining the amount of a secured claim and the second directs how the valuation should be made. The Court of Appeals erred by not viewing the subsection as a whole and by limiting the value of a secured claim to liquidation cost even when the debtor intends to retain and use the creditor's collateral.

Valuing a secured claim for the purposes of Chapter 13 plan confirmation based on a hypothetical sale by the creditor is incorrect given the directive found in the second sentence of § 506(a) to value the claim "in light of the purpose of the valuation and of the proposed disposition or use" of the collateral. This directive allows courts the

flexibility needed to value claims in the myriad of contexts that arise under the Bankruptcy Code. The Decision will result in secured claims being valued at a liquidation level regardless of the circumstances surrounding the valuation. This result is contrary to the meaning and purpose of § 506(a).

Limiting the standard of valuation to wholesale values not only violates the dictates of § 506(a), but also ignores important attributes of a secured creditor's interest in collateral. Liquidation of collateral is not the only right to which secured creditors are entitled and does not provide the only measure of a claim's worth. Rather, secured creditors realize the value of their lien through a variety of means established by contract or state law. In this case, ignoring the debtor's election to retain the collateral through the proceeding and after the conclusion of the case fails to account for an important fact bearing on the worth of the collateral securing the creditor's claim. The rule announced by the Court of Appeals effectively transfers the difference between the wholesale and replacement value to unsecured creditors at the expense of the secured creditor and in derogation of the valuation requirements of § 506(a).

ARGUMENT

I. THE COURT OF APPEALS FAILED TO CONSTRUE § 506(a) AS A WHOLE.

A. Both Sentences of § 506(a) Should Be Read Together When Valuing Secured Claims.

When construed as a whole in the context of plan confirmation, § 506(a) of the Bankruptcy Code compels the valuation of retained collateral based on its replacement rather than wholesale value. Section 506(a) provides in relevant part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . *is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property*, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. *Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property*, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). Correctly construed, the first sentence of this subsection describes what courts should value in determining the amount of a secured claim and the second directs how the valuation should be made. *Taffi v. United States (In re Taffi)*, 96 F.3d 1190, 1192 (9th Cir. 1996) (overruling *General Motors Acceptance Corp. v. Mitchell (In re Mitchell)*, 954 F.2d 557 (9th Cir. 1992)); *Rash*, 90 F.3d at 1061 (Smith, J., dissenting); *Metrobank v. Trimble (In re Trimble)*, 50 F.3d 530, 531 (8th Cir. 1995);

Coker v. Sovran Equity Mortgage Co. (In re Coker), 973 F.2d 258, 260 (4th Cir. 1992); *In re Chateaugay Corp.*, 154 B.R. 29, 33 (Bankr. S.D.N.Y. 1993). As stated by Judge Lifland in *Chateaugay*, statutory construction "'is a holistic endeavor' . . . and it is necessary to examine § 506(a)'s second sentence before reaching any conclusion with respect to the meaning" of the first. 154 B.R. at 33 (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)).

The Court of Appeals erred in concluding that the first sentence of § 506(a) both describes what is being valued and dictates how it should be valued. *Rash*, 90 F.3d at 1044-45. As acknowledged by the Decision, the first sentence is broadly drafted to encompass the many potential property interests encountered in bankruptcy cases as well as the fact that both senior and junior lien holders' secured claims are valued under its provisions. *Rash*, 90 F.3d at 1043. Specifically, the use of the phrase "creditor's interest" in the first sentence is not meant to limit how a secured claim should be valued, but instead serves "to remind us that a lien is not co-extensive with the property that it is a lien on." *In re Hoskins*, 102 F.3d 311, 314 (7th Cir. 1996); *see also Rash*, 90 F.2d at 1061 (Smith, J. dissenting).

This Court has repeatedly stated that the first sentence of this section simply means that the amount of the secured claim is equal to the value of the creditor's collateral, without ever suggesting that it establishes a standard for valuation as well. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372 (1988) (concluding that the phrase "value of such entity's interest" found

in § 361 means the value of a secured creditor's collateral); *United States v. Ron Pair Enters.*, 489 U.S. 235, 239 (1989); *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993) (allowed claim secured by a lien on debtor's property "is a secured claim to the extent of the value of [the] property"); *see also Dewsnup v. Timm*, 502 U.S. 410 (1992) (Scalia, J. dissenting). Indeed in *Timbers*, this Court elaborated that the reference to the creditor's interest in property in the first sentence "obviously means his security interest without taking account of his right to immediate possession of the collateral on default." 484 U.S. at 372. Thus, this Court has stated that the first sentence of § 506(a) identifies what should be valued without mandating how it should be valued.

The second sentence describes what factors must be considered in valuing the secured portion of a claim and when that valuation should occur. 11 U.S.C. § 506. The factors identified by the second sentence are (1) the purpose of the valuation and (2) the proposed use or disposition of the collateral. *Id.* When a debtor intends to retain collateral subject to a security interest, the debtor cannot reduce the value of a secured claim by approximating costs of a hypothetical sale, nor can the debtor limit the value of the secured claim to the price that could be obtained in a hypothetical liquidation sale. *Winthrop Old Farm Nurseries, Inc. v. New Bedford Inst. for Sav. (In re Winthrop Old Farm Nurseries, Inc.)*, 50 F.3d 72, 75 (1st Cir. 1995) (valuing junior mortgage holder's claim in Chapter 11); *Taffi*, 96 F.3d at 1192 (valuing IRS lien on real property in Chapter 11); *Huntington Nat'l Bank v. Pees (In re McClurkin)*, 31 F.3d 401, 405 (6th Cir. 1994) (valuing junior mortgage holder in Chapter 13); *Brown & Co. Securities Corp. v. Balbus (In re Balbus)*, 933 F.2d 246, 252 (4th

Cir. 1991) (valuing judgment lien encumbering real property in Chapter 13).

Courts have consistently held that personal property must be valued with reference to its actual use when determining the amount of a creditor's secured claim in Chapter 13. *Trimble*, 50 F.3d at 531-32; *In re Green*, 151 B.R. 501, 506 (Bankr. D. Minn. 1993); *In re Dews*, 191 B.R. 86, 90 (Bankr. E.D. Va. 1995); *In re Reynolds*, 17 B.R. 489 (Bankr. N.D. Ga. 1981) (each valuing automobiles in Chapter 13). *Cf. Taffi*, 96 F.3d at 1193 (determining that automobiles should be valued at fair market value but leaving determination of fair market value to the bankruptcy courts). In the context of Chapter 13 cases involving automobiles, these courts have reasoned that valuing the collateral based on a hypothetical sale by the creditor is inconsistent with the directive found in the second sentence to value the claim "in light of the purpose of the valuation and of the proposed disposition or use" of the collateral. *Trimble*, 50 F.3d at 531-32; *Green*, 151 B.R. at 506; *Dews*, 191 B.R. at 90; *Reynolds*, 17 B.R. at 493. As stated by the United States Court of Appeals for the Ninth Circuit in *Taffi*, "when the proposed use of the property is continued retention by the debtor, the purpose of the valuation is to determine how much the creditor will receive for the debtor's continued possession." 96 F.3d at 1192.

This application of each sentence of § 506(a) allows courts the flexibility in valuing collateral that was intended by Congress.[5] Section 506(a) governs valuation

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[5] Section 506(a)'s second sentence was initially found only in the Senate bill. *Compare* H.R. 8200, 95th Cong., 1st Sess. (1977) *and* S.2266, 95th Cong., 2nd Sess. (1978). The report accompanying the Senate bill notes that "courts will have to determine value on a case by case basis" and "[t]hroughout the bill, references to secured claims are only to the claim determined to be secured under this subsection, and not to the full amount of the creditor's claim." S. Rep. No. 989, 95th Cong., 2nd Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854.

of secured claims in numerous contexts in Chapters 7, 11, 12 and 13 of the Bankruptcy Code. 11 U.S.C. § 103. Courts should not be forced to use a single valuation standard in pursuit of the particular goals of each of those chapters. *See Hoskins*, 102 F.3d at 314. In addition, within each chapter, § 506(a) is employed to value secured claims for multiple purposes. The standard employed for determining value must depend on why the valuation is being made and the contemplated use of the collateral.[6] Moreover, § 506(a) governs the valuation of every kind of collateral possessed by debtors in each of these chapters. Its application is not restricted to real estate or automobiles; rather the section has been used to value boats, aircraft, pension benefits and other tangible and intangible personal property. *See, e.g., In re Perkins*, 134 B.R. 408, 411-12 (Bankr. E.D. Col. 1991); *In re Fiberglass Indus., Inc.*, 74 B.R. 738, 740 (Bankr. N.D.N.Y. 1987).

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[6] For example, in comparing the value provided to creditors under a reorganization plan with what would be available in a Chapter 7 liquidation, courts have properly valued estate assets at wholesale or quick sale prices and have taken into account hypothetical trustee expenses and capital gains taxes. *See, e.g., In re Riveria*, 116 B.R. 17 (Bankr. D. P.R. 1990); *In re Young*, 153 B.R. 886 (Bankr. D. Neb. 1993).

The wide variety of contexts in which bankruptcy courts apply the section and the diverse types of property valued demonstrate the importance of employing a standard based on the purpose of valuation and the proposed use or disposition of the collateral. The interpretation of § 506(a) employed by the Court of Appeals fails to provide such flexibility. If collateral is valued at wholesale cost when the debtor proposes to use the collateral through the proceeding and subsequent to plan completion, then there is no context within which a fair market value or replacement costs standard would ever be appropriate.

The Court of Appeals' reading of the statute leaves courts with a single valuation standard regardless of the circumstances. The section should be read as a whole so that it may be sensibly applied in the broad variety of contexts in which valuation arises under the Bankruptcy Code. When valuing secured claims for the purposes of plan confirmation under Chapter 13, those courts that have considered the language of § 506(a) as a whole have correctly concluded that valuation must be made in light of the debtor's intention to continue to use and enjoy the collateral.

B. The Decision Deprives the Second Sentence of Any Meaning and Ignores its Mandatory Language.

The Court of Appeals held that in every case the first sentence of § 506(a) requires a court to value only the secured creditor's right to repossess collateral and to exercise its rights under state law with respect to the

collateral. *Rash*, 90 F.3d at 1044. The Court of Appeals summarized its reasoning as follows:

> Ultimately it is the creditor's interest that is being valued under § 506(a), and such evaluation must account for the fact that the creditor's interest is in the nature of the security interest, giving the creditor the right to repossess and sell the collateral and nothing more. Therefore, the evaluation should start with what the creditor could have realized by exercising that right.

Id. Unfortunately, the value of the collateral "in the hands of the creditor" – regardless of its proposed use – is both the beginning and ending of the Court of Appeals' analysis.

The Court of Appeals' interpretation of the first sentence of § 506(a) renders the second sentence without purpose. Wherever possible, statutes should be construed so as to give effect to every part of the statute. *Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187 (1993) (superseded by statute on other grounds). One provision should not suspend or supersede another. *Id.* at ___, 113 S. Ct. at 2192. The meaning ascribed to the first sentence of § 506(a) by the Court of Appeals violates this basic canon of statutory construction and ignores the mandatory language of the second sentence.

When valuation is undertaken in the context of plan confirmation and the debtor proposes to retain and use the collateral through the proceeding and following its conclusion, the plain meaning of the second sentence requires a court to value the collateral in light of that use. *Trimble*, 50 F.3d at 532. *Cf. In re Valenti*, No. 95-5079, 1997 U.S. App. LEXIS 647, *10 (2d Cir. January 15, 1997)

(acknowledging that value of creditor's allowed secured claim must account for replacement cost of collateral).[7] The use of the word "shall" generally means that the congressional directive is mandatory rather than permissive. *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2235 n.9 (1995); *Nantucket Investors II v. California Fed. Bank (In re Indian Palms Assocs., Ltd.)*, 61 F.3d 197, 207 (3rd Cir. 1995) (construing 11 U.S.C. § 362(d)). There is no suggestion in the text or the legislative history that courts may choose whether or not to consider these factors.[8] Instead, bankruptcy courts must account for them in their valuations.

Courts that value automobiles in light of their proposed use by debtors have determined that a replacement or retail valuation standard is appropriate. *Trimble*, 50 F.3d at 532. In the context of the cramdown of a plan

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[7] In *Valenti*, the Court of Appeals for the Second Circuit upheld application of a local Northern District of New York rule which fixes value of retained vehicles in Chapter 13 cases at the average of wholesale and retail values absent contrary evidence of the vehicle's worth. While this is a convenient rule, it is not the method of valuation required by Section 506(a).

[8] A single valuation standard is inconsistent with the intent evidenced by the legislative history of the first sentence alone. Although the House bill did not contain the second sentence, the comments to this subsection of House Bill 8200 nonetheless stated: "'Value' does not necessarily contemplate forced sale or liquidation value of the collateral; nor does it always imply a full going concern. Courts will have to determine value on a case by case basis, taking into account the facts of each case and the competing interests in each case." H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 5963, 6312.

under § 1325, "the purpose of the valuation is to determine the amount the undersecured creditor will be paid for the debtor's continued use and possession of the vehicle which secured the debtor's obligation. The value of the creditor's interest in such cases is derived from the stream of payments the collateral secures" rather than a repossession and sale of the collateral. *Green*, 151 B.R. at 506. In Chapter 13 cases where the debtor proposes to keep the collateral, the value of the secured creditor's claim must be determined with reference to this use rather than a hypothetical disposition that will not take place under the plan. *Dews*, 191 B.R. at 90. A replacement or retail standard for valuation is the correct measure of a vehicle's value in this context.[9] This standard accounts for what a debtor would have to pay in the market place for an automobile of the same model, age and condition.[10] Section 506(a) requires courts to value secured claims in light of the purpose of the valuation and the proposed use of the collateral. In this case, the Court of

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[9] Perhaps the most universally recognized source of valuation for used automobiles is the N.A.D.A. Official Used Car Guide. *In re Marshall*, 181 B.R. 599, 604 n.9 (Bankr. N.D. Ala. 1995). The N.A.D.A. Guide contains a "retail" value and a "wholesale" value, which are based on those kinds of sales in the region for which the Guide is published. Publisher's Note, N.A.D.A. Official Used Car Guide, Eastern Edition, February, 1997.

[10] All N.A.D.A. values (whether retail or wholesale) assume the vehicle is clean. *Id.* An exceptionally clean vehicle or one which bears a warranty or guarantee should bring a greater price than the given value, while vehicles that must be reconditioned to be in salable condition will bring less than the average value. *Id.*

Appeals erred by disregarding the proposed use of the vehicle in its determination of the standard for valuing the Petitioner's secured claim.

II. USE OF WHOLESALE VALUATION TRANSFERS THE VALUE OF COLLATERAL FROM SECURED TO UNSECURED CREDITORS.

Limiting the method of valuing collateral to a liquidation price not only violates the dictates of § 506 but also ignores important attributes of a secured creditor's interest in collateral. Although a secured creditor has the right under non-bankruptcy law to repossess and sell its collateral upon default, this right "does not automatically mean that the value of the lien is equivalent to the amount the creditor would receive upon disposition of the collateral in satisfaction of its lien." *Trimble*, 50 F.3d at 531 (quoting *Green*, 151 B.R. at 505). Moreover, a creditor can realize the value of its lien in several ways: by a repossession and sale of the collateral, through receiving a stream of payments on the obligation underlying the security, or by agreeing to a consensual sale. *In re Jones*, 152 B.R. 155, 185 (Bankr. E.D. Mich. 1993) (methods other than repossession do not require creditor to absorb costs of a forced sale); *Green*, 151 B.R. at 505.[11] By choosing to

[11] Where residential real property serves as collateral, this Court has recognized that the rights of a secured creditor "include the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioners' residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure." *Nobelman v. American Sav. Bank*, 508 U.S. at 329.

retain the property, the debtor is acknowledging its value to be greater than liquidation or wholesale price. *In re Penz*, 102 B.R. 826, 828 (Bankr. E.D. Okla. 1989) (valuing farm land in Chapter 12 proceeding). Similarly, the creditor's interest is "enhanced by the proposed continued use of the property to help maintain employment and thereby effectuate the debtors' performance under the plan." *Green*, 151 B.R. at 505; *Dews*, 191 B.R. at 90. *Cf. General Motors Acceptance Corp. v. Mitchell (In re Mitchell)*, 954 F.2d 557, 561 (9th Cir. 1992) (Noonan, J., dissenting), *overruled by In re Taffi*, 96 F.2d 1190 (9th Cir. 1996). In his dissent in *Mitchell*, Judge Noonan noted, "[t]here is no better way of arriving at its value 'in the light of . . . its proposed use' than to determine the cost of a similar car." 954 F.2d at 561. The debtor's decision to continue to use collateral for his or her benefit necessarily affects the value of the collateral to both debtor and creditor. *See Mann, supra*, at 646-648 (noting value of collateral's use to debtor underlies creditor's pre-loan perception of risks and costs). This value cannot be ignored in determining the amount of the lien holder's secured claim for the purposes of plan confirmation.

In this case, ignoring the debtor's election to retain the collateral fails to account for a fact which bears on the worth of the collateral securing the creditor's claim and on the worth of the secured claim itself. This Court has

previously recognized that real property sold at a foreclosure sale cannot be valued in the same way as property sold in the ordinary course. *BFP, Inc. v. Resolution Trust Corp.*, 511 U.S. 531 (1994) (properly conducted foreclosure yields "reasonably equivalent value" for foreclosed property). This Court concluded that property "that *must* be sold within those strictures is simply *worth less*." *Id.* at 565 (emphasis in the original). The fact that property is subject to forced sale, "like any other fact bearing upon the property's use or alienability, necessarily affects its worth." *Id.* at 571. In the context of valuation pursuant to § 506(a), valuing retained collateral as if it were being liquidated results in the same incongruity as valuing foreclosed property as if it were being sold on an open market.

Value is defined and determined "in a particular situation from the purpose for which a valuation is being made." *Group of Institutional Investors v. Chicago, M., St. P. & P. R.*, 318 U.S. 523, 540 (1943) (valuing interest of equity holders in railroad reorganization case). In a Chapter 13 reorganization, the use of an automobile is usually essential to the success of the completion of the plan. *Marshall*, 181 B.R. at 603; *Reynolds*, 17 B.R. at 493 (retaining vehicle enables the debtors to avoid the necessity of replacement transportation).

Even prior to the enactment of the current Bankruptcy Code, courts recognized the unique importance of a vehicle to the Chapter 13 debtor and thus to the debtor's creditors. *In re Rutledge*, 277 F. Supp. 933 (E.D. Ark. 1967); *In re Pizzolato*, 268 F. Supp. 353 (W.D. Ark.

1967). In *Pizzolato*, the district court upheld the bankruptcy referee's decision to enjoin foreclosure of the debtor's vehicle because its use was necessary for the "stability of the proposed plan and without it the plan would collapse." 268 F. Supp at 354; *see also Rutledge*, 277 F. Supp. at 935 (conditioning injunction on debtor implementing repayment plan for full contract amount).

The Decision transfers this enhanced value of the collateral to the debtor's unsecured creditors in every reorganization case without acknowledging the true value of the creditor's interest in the collateral.[12] *Rash*, 90 F.3d at 1064 (Smith, J. dissenting). The difference between wholesale and retail price (or liquidation and fair market value) is generally paid to unsecured creditors through the reorganization plan because Chapter 13 requires a debtor to commit his or her disposable income to the plan for a period of three to five years.[13] 11 U.S.C. §§ 1322, 1325. This transfer is not justified given that the use of the collateral often makes the reorganization possible. Just as increases in collateral value during the pendency of a case accrue to the benefit of the secured creditor, a secured claim should be valued at confirmation to allow

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[12] The losses borne by secured creditors as a result of this transfer will be felt by non-bankrupt consumers as well. As noted in the lending industry's statement to the National Bankruptcy Review Commission, bankruptcy losses mean higher credit costs and lower credit availability to all customers. *Statement to N.B.R.C.* at 2, 6 and 7.

[13] It is also possible for the debtor to realize this difference by selling the collateral for greater than wholesale value following plan confirmation. *See Winthrop*, 50 F.3d at 75.

the creditor full compensation for the value of its collateral. *See Dewsnup*, 502 U.S. at 417 (increases in value of collateral should benefit secured creditor rather than unsecured creditors or debtor).

Allowing a debtor to value an automobile at a liquidation or wholesale price when it will be used throughout the debtor's performance under his reorganization plan and following the debtor's discharge ignores the value of that use to the debtor and his creditors. The difference between the wholesale and replacement value is effectively transferred to unsecured creditors and the true value of the secured creditor's collateral, as well as that creditor's contribution to the reorganization, goes unrecognized.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted this 28th day of February, 1997.

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